87-1559

Supreme Court, U.S.
FILED
MAR 16 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

MASON H. ROSE, V,

Petitioner,

v.

SUSAN T. FULTZ,

Respondent.

APPENDIX
TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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March 16, 1988

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APPENDIX A: CONSTITUTIONAL PROVISION, RULES AND STATUTE INVOLVED

A. UNITED STATES CONSTITUTION

Fifth Amendment, Due Process Clause

No person shall . . . be deprived of life, liberty, or property, without due process of law; . . ."

B. FEDERAL RULES OF CIVIL PROCEDURE [1/]

1. Rule 4

Rule 4. Process.

. . . .

(c) SERVICE.

. . . .

(2)(A) A summons and complaint shall, except as provided in subparagraphs (B) and (C) of this paragraph, be served by

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[1/] The rules set forth in this appendix are the present rules, as reprinted in J. Moore, Moore's Federal Practice, Federal Civil Rules 1988, pt. I at 30-34, 127-29, 675, 886-87 (1988). There have been minor changes since service was attempted here, made by 1987 Amendments to Rules 4, 12 and 60, and a 1985 Amendment to Form 18-A. The changes were technical (id. at 47, 134, 684, 889-90) and do not affect this litigation.

any person who is not a party and is not less than 18 years of age.

. . . .

(C) A summons and complaint may be served upon a defendant of any class referred to in paragraph (1) or (3) of subparagraph (d) of this rule--

(i) pursuant to the law of the State in which the district court is held for the service of summons or other like process upon such defendant in an action brought in the courts of general jurisdiction of that State, or

(ii) by mailing a copy of the summons and of the complaint (by first-class mail, postage prepaid) to the person to be served, together with two copies of a notice and acknowledgment conforming substantially to form 18-A and a return envelope, postage prepaid, addressed to the sender. If no acknowledgment of service under this

subdivision of this rule is received by the sender within 20 days after the date of mailing, service of such summons and complaint shall be made under subparagraph (A) or (B) of this paragraph in the manner prescribed by subdivision (d)(1) or (d)(3).

(D) Unless good cause is shown for not doing so the court shall order the payment of the costs of personal service by the person served if such person does not complete and return within 20 days after mailing, the notice and acknowledgment of receipt of summons.

. . . .

(d) SUMMONS AND COMPLAINT: PERSON TO BE SERVED. The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:

(1) Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

. . . .

(e) SUMMONS: SERVICE UPON PARTY NOT INHABITANT OF OR FOUND WITHIN STATE. Whenever a statute of the United States or an order of court thereunder provides for service of a summons, . . . upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by

the statute or order, or, if there is no provision therein prescribing the manner of service, in a manner stated in this rule. Whenever a statute or rule of court of the state in which the district court is held provides . . . for service of a summons, . . . upon a party not an inhabitant of or found within the state, . . . service may . . . be made under the circumstances and in the manner prescribed in the statute or rule.

(f) TERRITORIAL LIMITS OF EFFECTIVE SERVICE. All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held, and, when authorized by a statute of the United States or by these rules, beyond the territorial limits of that state. . . .

2. Appendix of Forms, Form 18-A
(referred to in Rule 4(c)(2)(C)(ii))

Form 18-A.--NOTICE AND ACKNOWLEDGMENT
FOR SERVICE BY MAIL

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK [2/]

Civil Action, File Number _____

A.B., Plaintiff	
v.	Notice and Acknowledgment of Receipt of Summons and Complaint
C.D., Defendant	

NOTICE

To: (insert the name and address of the person to be served).

The enclosed summons and complaint are served pursuant to Rule 4(c)(2)(C)(ii) of the Federal Rules of Civil Procedure.

You must complete the acknowledgment part of this form and return one copy of the completed form to the sender within 20 days.

[2/] Of course, the district of the issuing court (here the District of Colorado) is to be substituted for the Southern District of New York.

You must sign and date the acknowledgment. If you are served on behalf of a corporation, unincorporated association (including a partnership), or other entity, you must indicate under your signature your relationship to that entity. If you are served on behalf of another person and you are authorized to receive process, you must indicate under your signature your authority.

If you do not complete and return the form to the sender within 20 days, you (or the person on whose behalf your are being served) may be required to pay any expenses incurred in serving a summons and complaint in any other manner permitted by law.

If you do complete and return this form, you (or the party on whose behalf you are being served) must answer the complaint within 20 days. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

I declare, under penalty of perjury, that this Notice and Acknowledgment of Receipt of Summons and Complaint will have been mailed on (insert date).

_____
Signature

_____
Date of Signature

ACKNOWLEDGMENT OF RECEIPT
OF SUMMONS AND COMPLAINT

I declare, under penalty of perjury, that I received a copy of the summons and of the complaint in the above-captioned matter at (insert address).

_____
Signature

_____
Relationship to Entity/
Authority to Receive
Service of Process

3. Rule 12

Rule 12. Defenses and Objections--When and How Presented--By Pleading or Motion--Motion for Judgment on Pleadings.

(b) HOW PRESENTED. Every defense, in law or fact, to a claim for relief in any

pleading, . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. . . .

. . . .

(g) CONSOLIDATION OF DEFENSES IN MOTION. A party who makes a motion under this rule may join with it any other

motions herein provided for and then available to the party. If a party makes a motion under this rule but omits therefrom any defense or objection then available to the party which this rule permits to be raised by motion, the party shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision (h)(2) hereof on any of the grounds there stated.

(h) WAIVER OR PRESERVATION OF CERTAIN DEFENSES.

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

4. Rule 60

Rule 60. Relief From Judgment or Order.

(a) CLERICAL MISTAKES. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. . . .

(b) MISTAKES; INADVERTENCE; EXCUSABLE NEGLECT; NEWLY DISCOVERED EVIDENCE; FRAUD, ETC. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void;

. . . The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. . . .

C. COLORADO STATUTE AND RULE [3/]

1. Colorado Revised Statutes, Section 13-1-125.

13-1-125. Service of Process. (1) Service of process upon any person subject to the jurisdiction of the courts of Colorado may be made by personally serving the summons upon the defendant or respondent outside this state, in the manner prescribed by the Colorado rules of civil procedure, with the same force and effect

---

[3/] This Colorado statute and rule would become relevant if it is determined that state long-arm service was available after an unsuccessful attempt at mail service under Federal Rule 4(c)(2)(C)(ii).

as if the summons had been personally served within the state.

2. Colorado Rules of Civil Procedure, Rule 4.

Rule 4. Process.

. . . .

(d) By whom served. Process may be served:

(1) Within the state, by the sheriff of the county where the service is made, or by his deputy, or by any other person over the age of eighteen years, not a party to the action;

(2) At any other place by a sheriff, deputy sheriff, constable, deputy constable, bailiff, deputy bailiff, or other officer having like powers and duties of the political subdivision in which the service is made or an officer authorized by the laws of this state to take acknowledgements in such political subdivision to deeds conveying real estate situate in this state or an

attorney, counselor at law, solicitor, advocate, barrister duly qualified to practice law in such political subdivision or a person specially commissioned to serve process by the court in which the action is pending.

(e) Personal Service in State. Personal service within the state shall be as follows:

(1) Upon a natural person over the age of eighteen years by delivering a copy or copies thereof to him personally, or by leaving a copy or copies thereof at his dwelling house or usual place of abode, with some member of his family over the age of eighteen years, or at his usual place of business, with his stenographer, bookkeeper, or chief clerk; or by delivering a copy to an agent authorized by appointment or by law to receive service of process;

. . . .

(f) Personal Service Outside the State. Personal service outside the state may be made:

(1) In any action, upon a natural person over the age of eighteen years who is a resident of this state, or who is a nonresident of this state and who has submitted to or has become subject by law to the jurisdiction of the courts of this state, by delivering a copy of the process, together with a copy of the pleading upon which it was issued, to the person served;

. . . .

(g) Other Service. Service by mail or publication shall be allowed only in cases affecting specific property or status or other proceedings in rem.

. . . .

APPENDIX B:
ORDER, FINDINGS, CONCLUSIONS AND JUDGMENT OF CALIFORNIA AND COLORADO DISTRICT COURTS

A. The Order Appealed from to the Ninth Circuit: "Order After Contempt Hearing July 15, 1985," filed July 15, 1985, in the California District Court.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL ACTION NO. MISC 15142
CV-85-1854-TJH (Bx)

SUSAN THERESE FULTZ a/k/a SUSAN FULTZ-SMALL
Plaintiff
vs
MASON H. ROSE, V
Defendant

ORDER AFTER CONTEMPT HEARING JULY 15, 1985
[Filed July 15, 1985]

THIS MATTER having come regularly before the Court on July 15, 1985, upon the Plaintiff's Order to Show Cause: Citation for Contempt (Second) directed to the Defendant Mason H. Rose, V. At the hearing conducted herein, Plaintiff was represented by Messrs. James A. Beckwith and Joseph Ferrante, and Defendant Mason H. Rose, V was represented by Mr. James M. Weinberg.

After consideration of the arguments of counsel and the affidavits filed herein, together with the pleadings and memoranda of law, the Court

MAKES THE FOLLOWING FINDINGS OF FACT:

1. That on November 10, 1983, Plaintiff filed the within action in the United States District Court, District of Colorado.

2. That on February 20, 1984, service of process was made upon Defendant's wife, Wynonah D. Rose, at 37 Crest Road West, Rolling Hills, California, within the County of Los Angeles.

3. That on February 20, 1984, the address of 37 Crest Road West, Rolling Hills, California, was Defendant's usual place of abode inasmuch as Defendant's registered mailing address, registered voting address, and personal business address were voluntarily listed as such by the Defendant at the time substituted service was performed.

4. That between November, 1983, and March, 1984, the Defendant was absent from the Rolling Hills address on personal and professional business. Despite such temporary absences, however, the Defendant Rose continued to maintain a reasonable and substantial nexus to 37 Crest Road West sufficient to satisfy Rule 4(d)(1), F.R.C.P.

5. That on February 21, 1984, the Defendant Rose received at his law offices, located at 4010 Palos Verdes Drive North, Rolling Hills Estates, California, a registered, return receipt letter containing the Notice of Suit required under Rule 4(c)(2)(c), together with a copy of the summons and complaint in the pending Colorado action.

6. That the Defendant Rose personally read and had knowledge of the summons and complaint, having received from his office staff the mailed documents described in Paragraph 5 above.

7. That between April and December 10, 1984, the Defendant Rose received from Plaintiff copies of all motions and pleadings directed toward the request for and ultimate entry of default judgment against him by the Colorado federal court.

8. That in response to all notices, summons and complaints, the Defendant Rose voluntarily and knowingly failed and refused to take any action by himself or through counsel with respect to the pending Colorado suit against him.

9. That on April 15, 1985, Defendant Rose voluntarily appeared before this Court in response to an Order to Show Cause compelling his appearance. That, at that time and place the Defendant was directed by this Court to appear on April 16, 1985, at the offices of Plaintiff's California counsel to give his deposition as requested by Plaintiff.

10. That on April 15, 1985, the Defendant received, by service upon his legal

offices, notice of the date, time, place and personal requirements placed upon him by this Court's directive.

11. That on April 16, 1985, the Defendant voluntarily chose to obey the Court's Order by appearing for his deposition. However, in spite of the clear language in its written Order, he refused to be sworn and answer questions upon his deposition.

12. That such acts as committed by the Defendant Rose on April 16, 1985, were knowingly and willfully in violation of this Court's Order and therefore contemptuous of the power and dignity of this Court.

13. That Plaintiff has suffered unnecessary and increased costs, expenses and attorney fees as a direct result of Defendant's contempt, all in the sum of $5000.00.

14. That Defendant Rose has not asserted any ground for relief from judgment

except the alleged invalidity of the Colorado judgment due to defective service of process.

AND MAKES THE FOLLOWING CONCLUSIONS OF LAW:

1. That substituted service of process upon a non-resident outside the boundaries of the State of Colorado is an authorized procedure under Colorado State statutes, rules and decisions.

2. That substituted service of process pursuant to Rule 4(d)(1) F.R.C.P. and Section 13-1-125 C.R.S. 1981 Supp. was valid and proper, thereby granting in personam jurisdiction over the Defendant Rose by the United States District Court, District of Colorado, Honorable Richard P. Matsch, Judge Presiding.

3. That in all respects the default judgment rendered against the Defendant Rose by the Colorado federal court was valid and proper.

AND THEREFORE ORDERS:

1. That the Defendant's Motion to Set Aside Judgment is hereby denied and dismissed;

2. That the Stay on Writs of Execution previously entered by this Court is hereby vacated forthwith;

3. That the United States Marshall is hereby directed to forthwith proceed with the publication and conduct of the sale of all real and personal property heretofore levied upon and to make return of all proceeds of sale in accordance with law;

4. That the Defendant Mason H. Rose, V shall forthwith pay and deliver unto Plaintiff the sum of $5,000.00, as damages suffered by the Defendant's contempt;

5. That the Defendant Mason H. Rose, V shall forthwith pay to the Clerk of the Court the sum of $500.00, as a financial penalty for his contempt of the dignity and integrity of this Court; and

6. [Deleted.]

ORDERED AND SIGNED in open Court this 15 day of July, 1985.

BY THE COURT:

/s/
Honorable Terry J. Hatter
Judge Presiding

B. Judgment, entered December 11, 1984, in the Colorado District Court (and registered by filing January 17, 1985, in the California District Court)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 83-M-2163

SUSAN THERESE FULTZ
a/k/a SUSAN FULTZ-SMALL,
Plaintiff,

v.

MASON H. ROSE, V., H.L. QUIST, and H.L. QUIST MANAGEMENT AND DEVELOPMENT CORPORATION,
Defendants.

JUDGMENT
[Entered December 11, 1984]

Pursuant to and in accordance with the Findings of Fact and Order for Default Judgment, entered by the Honorable Richard

P. Matsch, Judge, signed and filed on December 11, 1984, and it is

ORDERED, that judgment is entered in favor of the plaintiff and against the defendant Mason H. Rose, V., and it is

FURTHER ORDERED, that the plaintiff shall have and recover from the defendant Mason H. Rose, V., compensatory damages in the amount of $106,128.34 which includes 15% interest per annum on the unpaid lease value to the date of this judgment; attorney's fees in the amount of $9,917.19 pursuant to the Equipment Lease Agreement for a total compensatory damages of $116,045.53, and it is

FURTHER ORDERED, that the plaintiff shall have and recover from the defendant Mason H. Rose, V., punitive damages in the amount of $348,136.59 plus court costs, as determined by the Local Rule 105, in the amount of $570.50 for a total judgment of $464,752.62 which sum shall bear interest

at the rate of 9.5% from the date of the entry of this judgment, and it is

FURTHER ORDERED, that this judgment is a final judgment under F.R.Civ.P. 54(b) because there is no just reason for delay.

DATED at Denver, Colorado, this 11th day of December, 1984.

FOR THE COURT:

JAMES R. MANSPEAKER, CLERK

/s/
Stephen P. Ehrlich,
Chief Deputy Clerk

C. Findings of Fact and Order for Default Judgment, filed December 11, 1984, in the Colorado District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CIVIL ACTION NO. 83-M-2163

SUSAN THERESE FULTZ
A/K/A SUSAN FULTZ-SMALL,
Plaintiff,
vs.
MASON H. ROSE, V., et al.,
Defendant

FINDINGS OF FACT AND
ORDER FOR DEFAULT JUDGMENT
[Filed December 11, 1984]

THIS MATTER having come before this Court on December 5, 1984 upon the hearing on Plaintiff's Motion for Default Judgment Against Defendant Rose and the Court having received documentary and testimonial evidence thereon; and

MAKES THE FOLLOWING FINDINGS OF FACT

1. That Plaintiff Susan Fultz (Fultz) filed the within action against Defendant Mason H. Rose, V (Rose) on November 10, 1983. Plaintiff is a citizen of the State of Colorado, and Defendant Rose is a citizen of the State of California.

2. That on February 20, 1984, substituted service was made upon Wynona Rose, the wife of Defendant Rose, in the City of Rolling Hills, California.

3. That on February 16, 1984, service of summons and complaint was made by registered mail upon Defendant Rose.

4. That in response to each service of process, Defendant Rose has failed to

answer or otherwise respond to the complaint, and such failure is without lawful justification or excuse.

5. That on April 9, 1984, the Clerk of the U.S. District Court, upon proper notice to Defendant Rose, entered Defendant's default upon the docket of proceedings.

6. That on August 3, 1984, Plaintiff filed her Motion for Default Judgment, with due and proper notice thereof being given to Defendant.

7. That on October 23, 1984, this Court sent notice to Defendant Rose of its intent to conduct hearing on Plaintiff's Motion for Default Judgment.

8. That, in accordance with this Court's directive, Plaintiff served copies of all briefs, exhibits and affidavits upon Defendant Rose on November 16, 1984 and again on November 30, 1984, with proof of service having been made in each instance.

9. That upon each notice as heretofore described, Defendant Rose has not made or caused to be made any answer, response or objection to this Court or to Plaintiff's counsel.

10. That upon the hearing of December 5, 1984, this Court received into evidence Plaintiff's Exhibits 1-14 and 17-19, together with the testimony of Susan T. Fultz and Richard Speck, as well as the affidavits of H. L. "Buster" Quist and James A. Beckwith.

11. That the factual circumstances pertinent to jurisdiction and Plaitiff's claims; as disclosed in the evidence before this Court are as follows:

a. In May, 1976, Plaintiff's husband was killed in a helicopter crach while upon service to the U.S. Navy.

b. In December, 1976, Plaintiff received inquiries from an agent of Defendant Rose regarding her interest in

prosecuting wrongful death litigation against third parties.

c. In December, 1976, Defendant Rose contacted Plaintiff by telephone encouraging her to retain Defendant's services in prosecuting such wrongful death litigation.

d. In December, 1976, and resulting from the prior telephone conversation, Defendant Rose conducted a personal meeting with Plaintiff at a hotel in the City and County of Denver, Colorado during which Defendant discussed his theory of liability, the nature of the claims and his contingency fee arrangement. As a result of this meeting, Plaintiff and Defendant entered into an attorney-client relationship.

e. In June, 1980, Defendant successfully settled the wrongful death claims with funds then being due to Plaintiff in the approximate amount of $100,000.

f. During June, 1980, Defandant Rose undertook to advise Plaintiff of investment opportunities for such settlement proceeds in restaurant ventures located in the State of Arizona. The nature of Defendant's proposal was for Plaintiff to purchase certain restaurant equipment with the proceeds of the wrongful death settlement. This equipment would then be leased to Let-Us Developers of Arizona, Inc. d/b/a Salad Bar of Cinema Park. Defendant Rose was a shareholder in Let-Us Developers of Arizona.

g. In determining the advisability of such an investment, Plaintiff relied totally and exclusively upon the advice and representations of Defendant Rose, who was then acting as her attorney and who had voluntarily undertaken to act as her investment counselor.

h. The nature of the investment advised by Defendant Rose was high risk. Further,

it involved a business in which Defendant Rose then held a personal ownership, control and management.

i. On July 24, 1980, Defendant Rose met with Plaintiff and H. L. "Buster" Quist at a hotel in the City and County of Denver, Colorado. At such meeting, Defendat [sic] Rose delivered to Plaintiff the proceeds of the wrongful death settlement. Defendant Rose further discussed with Plaintiff the equipment leasing venture and the profits to be derived therefrom. Further, during this meeting, Defendant Rose verbally proclaimed his fiduciary duty to Plaintiff, as her attorney, stating that he would protect and save Plaintiff from harm or loss in the venture. The Court finds that these statments [sic] were made by Defendant with the intent to induce Plaintiff to rely thereon and invest in the venture. The Court

further finds that Plaintiff did rely upon the Defendant's representations and delivered at that meeting the sum of $70,000 to be used to purchase the restaurant equipment.

j. Subsequent to the July, 1980 meeting, Plainfiff received at and executed in Denver, Colorado Articles of Limited Partnership for Fultz Leasing Company. Additionally, she recieved [sic] a duplicate original of the Equipment Lease Agreement between Fultz Leasing and Let-Us Developers of Arizona.

k. On September 15, 1980, Defendant Rose executed and caused to be delivered to Plaintiff a letter in which he, first, acknowledged his continuing fiduciary duty to Plaintiff as her attorney and, second, personally guaranteed payment of the equipment lease.

l. Plaintiff received monthly payments on the equipment lease obligations up to

and including November, 1981. From and after December 1, 1981, neither Plaintiff nor Fultz Leasing Company has received any payment of monthly lease obligations on the lease.

m. In or about November, 1981, Defendant Rose took physical possession of the restaurant equipment and removed same to one Sunday's Restaurant located in Rolling Hills Estates, California. At the time of taking physical possession, Defendant Rose had an ownership interest in Sunday's Restaurant. Further, Defendant Rose represented at such time that he continued to be Plaintiff's attorney.

n. From and after November, 1981, Plaintiff and H. L. "Buster" Quist made repeated inquiries to Defendant Rose by telephone and correspondence as to the precise location of and payments for the restaurant equipment. Defendant

Rose did not respond to any such inquiries, nor did Plaintiff receive any moneys as required by the lease agreement.

o. On one occasion during this period, H. L. "Buster" Quist visited Sunday's Restaurant in California and determined that the restaurant equipment identified to the lease Agreement was then and there installed and being used.

p. Pursuant to Section 5 of the Equipment Lease Agreement, the total lease obligation was $94,353.63, of which Plaintiff received $21,247.53 up to and including November, 1981. The unpaid balance thereof is, therefore, the sum of $73,109.10. Section 5 of the Lease Agreement provides an interest rate on any unpaid balance at fifteen percent (15%) per annum. Section 20 of the Lease Agreement confers the right to attorney's fees and costs in the event of default.

q. Pursuant to the Affidavit of Plaintiff's counsel, Plaintiff has incurred to date $9,917.19 attorney's fees and expenses in this matter to date and court costs in the sum of $570.50. All of such sums are found, as a factual matter, to be reasonable and necessary costs, fees and expenses in this matter.

r. As further disclosed by the evidence, Defendant Rose has, since December, 1981, adopted a tactic of virtual and inexcusable silence regarding the inquiries, and, later, demands by Plaintiff. This tactic has continued through the institution and prosecution of the present litigation up to and including the hearing on the Motion for Default Judgment.

s. Evidence presented at the hearing, from Mr. Richard Speck, suggests that Defendant Rose's personal residence, located

at 37 Crest Road West Rolling Hills, California, has a probable market value of $750,000, with a 1974 mortgage in an original sum of $115,000, on said property.

t. Further evidence of Defendant's financial net worth is practicably unreachable owing to the refusal of Defendant Rose to respond to the Complaint filed herein.

AND MAKES THE FOLLOWING CONCLUSIONS OF LAW

1. That service of process upon the Defendant Rose, in each instance, was proper and in full comportment with Rule 4 FRCP and, specifically, Rule 4(c)(2)(C)(ii) FRCP.

2. That Defendant Rose is in full and complete default before this Court upon the claims made against him by Plaintiff Fultz, and, thus, the allegations made therein may be construed as true and accurate.

3. That Plaintiff's evidence fully and completely sustains the allegations and claims made against Defendant Rose including the following:

a. That Defendant Rose knowingly and willfully breached the terms of the September 30, 1980 lease guarantee given by him to Plaintiff in the principal sum of $73,109.10, together with interest thereon at fifteen percent (15%) per annum from December 1 1981 and, therefore, Defendant Rose is liable for same in the full amount of $106,128.34, including principal and interest to December 5, 1984.

b. That Defendant Rose is further liable for attorney fees and expenses, excluding court costs, in the sum of $9,917.19, pursuant to the lease agreement and guarantee thereof by Defendant Rose;

c. That Defendant Rose, knowing and

proclaiming his fiduciary duty to Plaintiff as her attorney, willfully and knowingly violated and breached such fiduciary duty, owed to Plaintiff by him;

d. That in violating his fiduciary duty owed to Plaintiff, Defendant acted maliciously, oppressively and fraudulently as those terms are defined in the California Civil Code, Section 3294 and deemed applicable by this Court to Defendant Rose as a licensed California attorney.

e. That as a proximate result of Defendant's conduct in breaching the lease guarantee and the attorney's fiduciary duty, the Plaintiff has suffered specific financial damages in the sum of $106,128.34, together with the betrayal of trust and confidence arising from the attorney-client relationship.

4. That this Court, sitting under

diversity jurisdiction pursuant to 28 USC 1332, has jurisdiction over Defendant Rose pursuant to Section 13-1-124 CRS, (1973) (Colorado long arm statute).

5. That venue in this Court is proper pursuant to the terms of 28 USC Section 1391, inasmuch as Plaintiff is a resident and citizen of the State of Colorado.

6. That with respect to Plaintiff's claim for punitive damages, this Court is empowered to exercise its discretion with respect to the conduct of the Defendant Rose. In so doing, this Court is mindful of the fact that Defendant Rose is an attorney, licensed by the State of California. On the evidence presented to this Court, which is uncontradicted, Defendant Rose has caused the appearance, if not the fact, of numerous violations of ethical and legal standards applicable to attorneys and counselors at law. His conduct is deemed so egregious and offensive to

responsible and ethical behavior by attorneys as to compel this Court to award punitive damages. Any other course of action by this Court would be deemed to approve of or reward the Defendant Rose for his conduct. Such extraordinary circumstances as exist compel this award, even upon a default judgment as requested here. In measuring the amount of punitive damages, this Court deems it necessary to forego the customary measure of such damages, and to adopt that standard customarily applied to prevent and prohibit anti-trust activities. Therefore, this Court, in the full exercise of its discretion, adopts the standard of trebling the compensatory damages to Plainfiff in awarding punitive damages.

AND THEREFORE THE COURT ORDERS

1. That the Clerk of this Court shall forthwith enter judgment in this matter in favor of the Plaintiff Fultz and against

Defendant Mason H. Rose V in the following sums:

a. Compensatory damages in the sum of $106,128.34, including interest on the unpaid lease value at fifteen percent (15%) per annum to date of judgment;

b. Attorney fees in the sum of $9,917.19, pursuant to the Equipment Lease Agreement;

c. For total compensatory damages of $116,045.53.

d. Punitive damages in the sum of $348,136.59;

e. Court costs, as determined by the local Rules of Court, in the sum of $570.50

f. For a total judgment of $464,752.62, which sum shall bear interest at the statutory rate from date of entry of judgment.

2. The Court further orders and directs James A. Beckwith, Plaintiff's counsel, to forthwith assume responsibility for the

initiation and presentation of grievance proceedings against Defendant Mason H. Rose, V before the applicable committees or agencies of the California Supreme Court.

3. The Court further orders that the judgment against the Defendant Mason H. Rose, V is directed to be entered as a final judgment under F.R.Civ.P. 54(b) because there is no just reason for delay.

Dated: December 11, 1984

BY THE COURT

/s/
Richard P. Matsch
United States District Judge

APPENDIX C: NINTH CIRCUIT JUDGMENT SOUGHT TO BE REVIEWED, AND ORDER ON REHEARING

A. The Judgment Sought to Be Reviewed: Unpublished Memorandum Decision of the Ninth Circuit Court of Appeals, Filed June 10, 1987, Dismissing the Appeals as Moot.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 85-6202
86-5528

DC# CV 85-1854-TJH

SUSAN THERESE FULTZ, a/k/a SUSAN FULTZ-SMALL, Plaintiff-Appellee,
v.
MASON H. ROSE, V, Defendant-Appellant.

M E M O R A N D U M*
[Filed June 10, 1987]

Appeal from the United States District Court for the Central District of California - Terry J. Hatter, Jr., District Judge, Presiding - Argued and Submitted December 3, 1986 - Pasadena, California

Before: ANDERSON, PREGERSON**, and CANBY, Circuit Judges.

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*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 21.

**Judge Pregerson was randomly selected to replace Judge Solomon as a member of this panel because of the death of Judge Solomon.

Appellant, Mason Rose (Rose), filed separate appeals from two judgments rendered by the United States District Court for the Central District of California. In both appeals, Rose attacks the validity of a default judgment entered against him by the United States District Court for the District of Colorado arguing that the Colorado court lacked personal jurisdiction over him because of improper service of process. These appeals were consolidated along with appellee's, Susan Fultz's motion in this court to dismiss on the ground of mootness or to suspend Rose's appeals.

I. FACTS

On November 10, 1983, Fultz filed an action against Rose, an attorney, in the Colorado district court. Fultz made several unsuccessful attempts to serve Rose personally, both at his California residence and California law office. On

February 20, 1984, Fultz served Wynonah Rose, appellant's wife, at a residence located at 37 Crest Road West, Rolling Hills, California. In addition, Fultz sent a summons by registered mail to Rose's law office on February 21, 1983.

Fultz made several motions over a period of eight months, the last of which was a motion for default. Rose failed to answer or appear in any of these motions. On December 5, 1984, Fultz obtained a default judgment against Rose from the Colorado district court awarding her $116,616 for compensatory damages and $348,137 for punitive damages, based on claims of personal guarantee of a restaurant equipment lease, conversion of personal property, and breach of fiduciary duty.

On January 17, 1985, Fultz filed an action in the United States District Court for the Central District of California to enforce her Colorado judgment against

Rose. She subsequently served notice on Rose to take a debtor deposition. When Rose failed to appear for the deposition, Fultz sought to hold him in contempt. District Judge Terry J. Hatter denied Fultz's contempt motion, but ordered Rose to attend a subsequent deposition. Rose attended the deposition as ordered, but refused to answer questions relating to anything other than personal jurisdiction. As a result, Fultz filed a second motion for contempt against Rose. At the same time that Fultz filed her contempt motion, Rose filed a motion to set aside the default judgment of the Colorado court pursuant to Rule 60, Fed.R.Civ.P., because of lack of personal jurisdiction in the Colorado district court.

The court set the hearing on Fultz' motion for contempt for July 15, 1985. The court took Rose's motion to set aside the Colorado judgment off the calendar.

At the July 15th hearing, the parties' arguments focused on the validity of the Colorado judgment. Judge Hatter ruled against Rose on his motion to set aside the Colorado judgment and, in addition, found Rose in contempt for failing to comply with the earlier court order to participate in the debtor deposition. Rose appeals both decisions to this court.

On November 18, 1985, Rose filed a motion under Rule 60(b) to set aside Judge Hatter's July 15, 1985 decision. Judge Hatter denied Rose's motion on December 18, 1985. In March, 1986, this court consolidated Rose's two appeals and remanded them nunc pro tunc so the district court could dispose of Rose's November 18, 1984 Rule 60(b) motion.

On December 11, 1985, while pursuing his Rule 60(b) motion in the California district court and his appeal to this court, Rose filed a Rule 60(b) motion in

the Colorado district court for relief from the punitive damages and to correct the default judgment entered by that court in December, 1984. Rose offered to confess liability for compensatory damages. On March 14, 1986, Fultz filed a motion in this court to dismiss both of Rose's appeals while her case in Colorado is being litigated.

II. DISCUSSION

The single issue addressed by this court is whether Rose's appearance in the Colorado district court to set aside the default judgment renders moot the appeals filed by both Fultz and Rose. We find that it does.

The underlying argument in the consolidated appeals before this court is that the Colorado district court lacked jurisdiction over Rose because he was never properly served in accordance with the provisions of Rule 4 of the Federal Rules

of Civil Procedure. Therefore, if the Colorado district court had personal jurisdiction over Rose, either because Rose conferred jurisdiction upon the Colorado district court, or Rose waived his right to complain of a defect in service or personal jurisdiction, then the appeals before this court can properly be dismissed as moot. We find that both events occurred.

Jurisdiction attaches if a defendant makes a voluntary general appearance. Jackson v. Hayakawa, 682 F.2d 1344, 1347 (9th Cir. 1982), appeal after remand 761 F.2d 525 (9th Cir. 1985).

> Generally, an appearance in an action involves some presentation or submission to the court. [citation omitted]. An appearance may result from the filing of an answer without raising jurisdictional defects. An appearance may also arise by implication "from a defendant's seeking, taking, or agreeing to some step or proceeding in the cause beneficial to himself or detrimental to plaintiff other than one contesting only the juridiction or by reason of some act or proceedings

> recognizing the case as in court." 6 C.J.S. Appearances Section 18 at 22 (1975). [citation omitted].

Cactus Pipe & Supply v. M/V Montmarte, 756 F.2d 1103, 1108 (5th Cir. 1985). On December 11, 1985, Rose filed a Rule 60(b) motion in the Colorado district court to set aside the default judgment entered by that court one year earlier. In that motion, Rose only challenged the punitive damage award against him. (He later withdrew his confession of liability to compensatory damages and now contests that too). Rose informed the Colorado court that he was challenging the jurisdiction of that court to this court, but he did not raise any jurisdictional challenges before the Colorado court itself. We find that Rose's actions constituted a voluntary general appearance before the Colorado district court vesting it with personal jurisdiction.

Furthermore, Rose waived the defect of

lack of personal jurisdiction by appearing generally without first challenging the service of process problem in a preliminary motion or responsive pleading before the Colorado district court. Jackson, 682 F.2d at 1347; Benny v. Pipes, 799 F.2d 489, 492 (9th Cir. 1986) opinion amended in 807 F.2d 1514 (1987)(general appearance by defendant failing to dispute personal jurisdiction waives any defect in service or personal jurisdiction); Fed. R. Civ. P. 12(h)(1). Therefore, Rose has waived any challenge to the Colorado district court's personal jurisdiction over him based on any alleged defect in service.

Rose's argument that he has not waived his jurisdictional challenge because he raised and maintained his jurisdictional challenge in the California district court and now in this court on appeal is unpersuasive and the cases to which he cites for support are inapposite. See Chase v.

Pan-Pacific Broadcasting, Inc., 750 F.2d 131, 134 (D.C. Cir. 1984); Fahey v. O'Melveny & Myers, 200 F.2d 420, 451 n.9 (9th Cir. 1952); Orange Theatre Corp. v. Rayherstz Amusement Corp., 139 F.2d 871, 874 (3d Cir.), cert. denied 322 U.S. 740 (1944). These cases held that a defendant does not waive his jurisdictional defenses if he meshes them with defenses on the merits. Furthermore, in each of these cases, the defendant objected to the jurisdictional defect in a pre-answer motion or in the answer itself before the court in which he was appearing. In the case at bar, Rose did not raise a jurisdictional defense in the Colorado court.

The district court's order of July 15, 1985, upholding the validity of the default judgment and finding Rose in contempt is VACATED. The consolidated appeals before this court are DISMISSED as moot. The parties may now pursue this

case before the Colorado district court which now has jurisdiction over the parties and may address the issues on the merits.

B. Order on Rehearing: Unpublished Order of the Ninth Circuit Court of Appeals, Filed December 17, 1987, Denying Rose's Petition for Rehearing.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 85-6202
86-5528

DC# CV 85-1854-TJH

SUSAN THERESE FULTZ, a/k/a SUSAN FULTZ-SMALL, Plaintiff-Appellee,
v.
MASQN H. ROSE, V, Defendant-Appellant.

O R D E R
[Filed December 17, 1987]

Before: ANDERSON, PREGERSON,* and CANBY, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for

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*Judge Pregerson was randomly selected to replace Judge Solomon as a member of this panel because of the death of Judge Solomon.

rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX D: EXCERPTS FROM ROSE'S MOTION PAPERS */ IN THE COLORADO DISTRICT COURT

A. Rose's 12/11/85 Motion.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

DEFENDANT ROSE'S MOTION FOR RELIEF FROM DEFAULT JUDGMENT, BY REASON OF MISTAKE AND MISREPRESENTATION [FRCP 60(b)(1) and 60(b)(3)], AND BY REASON OF CLERICAL MISTAKE [FRCP 60(a)]

[Filed December 11, 1985]
[Caption Omitted]

Defendant MASON H. ROSE, V ("Rose"), by and through his counsel of record, James M. Weinberg of Los Angeles, California and

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*/ These are Rose's filings in connection with his Colorado Rule 60 motion that the Ninth Circuit held was "a voluntary general appearance" (App. C at 50a). These filings were before the Ninth Circuit in connection with Fultz' motion to dismiss the appeal. We here reproduce the entire motion, and excerpts from other filings, to show Rose not only "informed the Colorado court that he was challenging the jurisdiction of that court to [the Ninth Circuit]" (Ibid.), but he also presented to the Colorado court the facts and law relevant to jurisdiction, clearly asserting that his motion was in addition to--not instead of--his voidness claim.

Richard W. Breithaupt of McGuire, Cornwell and Blakey, Denver, Colorado, herewith submits his motion for an order granting relief from this Court's default judgment entered December 11, 1984. This motion is made pursuant to Rule 60 of the Federal Rules of Civil Procedure, by reason of:

(a) Mistake, inadvertence, surprise, or excusable neglect [Rule 60(b)(1)];

(b) Fraud, misrepresentation, or other misconduct of counsel for Plaintiff Susan Therese Fultz a/k/a Susan Fultz-Small ("Fultz"), an adverse party [Rule 60(b)(3)]; and

(c) Clerical mistakes in the default judgment, arising from oversight or omission [Rule 60(a)].

This motion is the first of two major motions which, as Rose now contemplates, will be filed in this Court within a few days of each other. The second contemplated motion is a motion for relief from

the default judgment for the reason that the judgment is void [Rule 60(b)(4)]. This motion is filed before the voidness motion (although the granting of the voidness motion would make this motion moot), because motions under Rules 60(b)(1) and 60(b)(3) [but not 60(b)(4)] must be made within one year after entry of judgment, and time does not permit the filing of both motions within the one-year period which ends on December 11, 1985.

In support of the present motion, Rose states and avers the following grounds:

A. GROUNDS RELATING TO BOTH RULE 60(a) AND RULE 60(b):

1. There were errors in the mathematical computation of the damages, arising from oversight or omission. Such errors may and should be corrected as clerical mistakes under Rule 60(a), or as mistakes under Rule 60(a)(1) [sic; this should be "60(b)(1)"]. In the Findings of Fact and

Order for Default Judgment ("12/11/84 Findings"), Conclusion 6 stated that "this Court . . . adopt[s] that standard customarily applied to prevent and prohibit anti-trust activities" and "Therefore . . . adopts the standard of trebling the compensatory damages to plaintiff is [sic; this should be "in"] awarding punitive damages." However, there were errors in the application of that standard, in that:

(a) The compensatory damages were quadrupled rather than trebled. Anti-trust damages are an overall total of three times the compensatory damages, plus costs and attorney's fees; thus the punitive portion is twice (rather than three times) the compensatory portion. Correct application of the announced standard would have resulted in an overall total of $318,385.02 in treble damages (of which $106,128.34 was compensatory and 212,256.168 would be

punitive). Because of this error, punitive damages were overstated by 100% of the compensatory damages, which is $106,128.34.

(b) Attorneys' fees, as well as compensatory damages, were quadrupled. In antitrust awards, attorneys' fees are added in once, after compensatory damages are trebled. Because of this error, punitive damages were overstated by three times the attorneys' fees of $9,917.19, resulting in an award that was excessive by $29,751.57.

B. GROUNDS RELATING ONLY TO RULE 60(b).

2. Fultz' claim for punitive damages was based on California law (12/5/84 Findings, p. 6, Conclusion 3d). Under California law, an antitrust standard is not appropriate for determining the amount of punitive damages. Instead, according to the leading case of Neal v. Farmers Insurance Exchange, 21 Cal.3d 910, 928, 148

Cal.Rptr. 389, 582 P.2d 980 (1978), the factors to be considered are (1) "the particular nature of the defendant's acts in light of the whole record;" (2) "the amount of compensatory damages awarded;" and (3) "the wealth of the particular defendant".

3. Here the award was confiscatory, when compared with the only evidence of net worth that was before the Court. The evidence (which was fraudulently or negligently overstated, as shown in Paragraph 4 below) shows a single asset consisting of $635,000 in home equity, made up of a $750,000 market value less a $115,000 mortgage (12/11/84 Findings, p.5, Finding 11s); that evidence further shows liabilities to Plaintiff Fultz (excluding punitive damages) in the total amount of $116,616.03, made up of $106,128.34 for compensatory damages, $9,917.19 for attorney's fees, and $570.50 for court costs

(12/11/84 Findings, p. 5, Findings 11q and p. 6, Conclusions 3(a) and 3(e)). That evidence thus shows a net worth of $518,383.97 ($635,000 less $116,616.03). The punitive damages of $348,136.59 were thus 67.1% of the net worth shown in the evidence before the Court.

4. Fultz has fraudulently or negligently (1) overstated the equity in the Rose family home (as of the default hearing on December 5, 1984) by more than $250,000; and (2) overstated Rose's one-half interest in that equity by more than $440,000. Most of this overstatement was due to Fultz' failure to pick up (or failure to disclose) a second lien on the property, in favor of Ellis Ring, recorded in Los Angeles County on April 27, 1984. Document No. 84-507119. The original principal amount of that lien, and also its principal amount on the 12/5/84 hearing date (payments are interest only, and were

then current), was $275,000.00 As of 12/5/84, the first lien had been paid down to $90,771.93. Deducting both liens from the $750,000 market value in evidence leaves an equity of $384,228.07. Furthermore, as a check of the record would have shown, Rose and his then wife (Wynonah D. Rose), were co-owners of the property (they still are), so Rose's 50% share of the true equity was $192,114.04. Thus Rose's share of the equity, and his net worth, were overstated by $442,880.96. Correction of the overstatement would have reduced the net worth shown by the evidence (see Paragraph 3 above) from $518,383.97 to $75,503.01, and the 348,136.59 punitive damage award was 461.1% of the corrected net worth figure.

5. It was not proper "to find that to default in a case amounts to a further basis for punitive damages" (12/5/84 Transcript, at 45:17 to 46:1, 12/5/84

Findings, Finding 11r. Aside from the general propriety of such a finding, . . . (1) here Rose was faced with a huge claim for punitive damages, not just a claim for his obligations to Fultz, so his failure to appear cannot be construed as fraud, opression [sic] or malice toward Fultz; (2) here, had Fultz been open with the Court, rather than failing to clearly disclose the facts relating to service (see below), the Court would have known there was a defect in (or at least a serious question about) service of process; and (3) as stated below, and in Rose's declaration, Rose reasonably and in good faith believed that he had not been served and had no duty to defend.

6. Fultz sent Rose certain documents in connection with the scheduled default hearing. Among the documents sent to Rose was a "Submission of Exhibit G to Plaintiff's Motion for Default Judgment",

submitted on or about August 23, 1984. That document advocated (in Paragraph 7) a formula for computing punitive damages, and closed with a prayer, in which "Plaintiff prays for Judgment in her favor on her claim for punitive damages in the sum of $147,280, or such other sum as this Court deems fair and reasonable." The "or such other sum . . ." can reasonably be interpreted to refer only to a lesser sum. In any event, punitive damages should not have exceeded the amount specifically prayed for in the papers served on Rose in connection with the default hearing. The actual award of punitive damages that exceed the prayed-for amount by over $200,000 was grossly unfair.

7. Any award of punitive damages in this case is a violation of Rose's due process and other constitutional rights, under the Fourth, Fifth and Sixth Amendments to the United States Constitution,

for the reasons discussed by Professor Malcolm E. Wheeler of the University of Kansas, in his article on "The Constitutional Case for reforming Punitive Damages Procedures", 69 Va.L.Rev. 269 (1983). These reasons are particularly powerful where (as here) the punitive damages were awarded on default, and where the conduct is the subject of a State Bar of California grievance proceeding that was instituted by order of this Court as part of the default judgment.

8. Whether or not punitive damages in this case are unconstitutional, the availability and actual use and pendency of State Bar of California grievance proceedings reduces or eliminates the need for punitive damages, which in California are imposed "to punish wrongdoers and thereby deter the commission of wrongful acts." Neal v. Farmers Insurance Exchange, supra, 21 Cal.3d at 928, fn. 13.

9. Fultz fraudulently or negligently prevented this Court from recognizing the jurisdictional questions relating to service of process, and from making an informed decision on those questions, by failing to clearly inform the Court (e.g., in Paragraph 2 and 3 of Plaintiff's Motion for Default Judgment): (1) that there had been no acknowledgment of mailed service; (2) that the return receipt for the mailed service was not signed by Rose; and (3) that both mailed and submitted [sic; this should be "substituted"] service had been made outside the State of Colorado.

10. If (contrary to law and fact) the service of process was valid, Rose was under the reasonable and good faith belief that he had not been served and had no legal duty to appear and defend. That belief was induced in part by the form of acknowledgment required by the Federal Rules and sent by Fultz with the mailed

service; from it, Rose reasonably and in good faith believed that (1) service by mail had not been completed, because he had not returned the acknowledgment (within the 20-day period, or at all), and he had not even received the mailing within the 20-day period; (2) no default could be entered against him because of the attempted service by mail, since he did not complete and return the acknowledgment form; and (3) another attempt at service "in any other manner permitted by law" would probably be made thereafter, and he risked liability for expenses of that service--and no more--by not having returned the form within 20 days. He did not know until March 1985, long after the default judgment was entered, that Fultz would claim to have made substituted service on his estranged wife.

11. This is not an appropriate case for punitive damages. The evil motive, and the oppression, fraud and malice required under California law, were all not present. The true facts are as stated in Rose's affidavit, and any contrary facts in the 12/5/84 Findings were due to Fultz' fraud and/or negligence. By way of example only, the crucial fact of inexcusable silence regarding Fultz' inquiries and demands (Finding 11r) is utterly untrue. Through Defendant Quist, Rose made an offer (to Fultz' attorney) to pay $30,000 for the equipment removed to California, prior to September 4, 1983; neither Rose nor Quist received a response to that offer, and suit was commenced two months later.

WHEREFORE, for the foregoing reasons, Rose prays for appropriate relief from the default judgment, including the elimination of punitive damages, and that he

be permitted to confess judgment for the compensatory damages alone, as stated in more detail in his affidavit.

SIGNED AND SUBMITTED December 9, 1985.

[Signatures and addresses omitted]

B. Excerpts from Rose's 12/11/85 Affidavit.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

AFFIDAVIT OF MASON H. ROSE, V
[Filed December 11, 1985]
[Caption Omitted]

Your affiant, MASON H. ROSE, V, upon his oath deposes and states as follows:

* * *

C. SERVICE OF PROCESS

7. Neither the summons nor the complaint in this action was ever served on me by delivery to me personally.

8. I never appeared in this action, specially or otherwise. Accordingly, the issue of the jurisdiction of this Court over me was never raised by me or litigated in this action.

(1) Attempted Service by Mail in California

9. In 1984, I was continuously out of California during the entire month of February and the first two weeks of March, in connection with a trial in the State Court in Lexington, Kentucky, which lasted from on or about February 3, 1984 through on or about March 14, 1984. I returned to California on March 14, 1984, but I was emotionally drained from the six-week trial in Kentucky and did not return to my office in any meaningful way for some weeks thereafter.

10. After my return to my office (I do not recall exactly when, but it was at least several days after March 14, 1984), I found at the office the papers that had been sent to me by Plaintiff's counsel pursuant to Rule 4(c)(2)(c)(ii). These papers included copies of the summons and complaint in the Colorado action, together

with a form captioned "NOTICE AND ACKNOWLEDGMENT OF RECEIPT OF SUMMONS AND COMLAINT"; a copy of that form is attached to this affidavit as Exhibit B [Exhibit B is substantially in the form of Official Form 18-A, Fed. R. Civ. P. Appendix of Forms]. Another copy of that form, together with copies of a receipt for certified mail dated February 16, 1984 and a return receipt signed by Lisa Rankins and showing February 21, 1984 as date of delivery, were attached as Exhibit B to Plaintiff's Motion for Default filed in this Court on or about August 3, 1985 [sic; this should be "1984"]. From those exhibits, it appears that these papers were sent by certified mail on February 16, 1984, addressed to me at my office in California. They were received by me, over a month later, at my office in California.

11. Lisa Rankins was never employed by me. She was not my secretary on February

21, 1984 or at any other time. I had no personal secretary on February 21, 1984 while I was in trial in Kentucky. My own personal secretary had terminated her services just prior to my leaving for that trial. Lisa Rankins was the personal secretary of Hofton L. Ballou, one of the other attorneys in our law suite. She did not call to my attention the papers she signed for on February 21, 1984, and I was unaware of them until I found them as described above.

12. I never signed or returned the acknowledgment in Exhibit B. Since I did not receive Exhibit B or the other enclosed papers until more than a month after the date (February 16, 1984) shown in Exhibit B, it was obviously too late to return the acknowledgment "within 20 days", as specified in Exhibit B.

13. Although I knew from Exhibit B and the other enclosed papers that this action

was pending and that Plaintiff had attempted to serve me by mail, I did not now [sic; this should be "know"] that Plaintiff would claim that service of process had already been completed (either by mail or by any other means), or that I then had any duty to defend or was otherwise answerable to Plaintiff's claim in this action. On the contrary, Exhibit B led me to believe, and I did believe, (1) that service by mail had not been completed, because I had not returned the acknowledgment (within the 20-day period or at all), and I had not even received the mailing within the 20-day period; (2) that no default could be entered against me because of the attempted service by mail, since I did not complete and return the acknowledgment form; (3) that another attempt at service "in any other manner permitted by law" would probably be made <u>thereafter</u>, and that I risked liability for the

expenses of that service--and no more--by my not having returned the form within 20 days.

(2) Attempted Substituted "Place of Abode" Service in California

14. Although there were references to Plaintiff's alleged substituted service on Mrs. Rose in some of the many papers sent to me at the time of the default proceedings, I did not become aware of Plaintiff's claim of substituted service until on or about March 8, 1985, when Plaintiff's counsel, Mr. Beckwith, advised me of it in a telephone conversation. Mr. Beckwith had not sent me a copy of the Return of Service (signed by process server Ron Hughes and dated February 22, 1984) when it was filed in this action.

15. I never received the copy of the summons and complaint that Mr. Hughes said (in the Return of Service) he served on Mrs. Rose, on February 20, 1984, at 37

Crest Road West ("37 Crest"), Rolling Hills, California. Mrs. Rose did not give them to me, and she has never told me or admitted to me that she received them. On the contrary, on or about April 15, 1985, she denied having been served.

16. At the time of the alleged substituted service on Mrs. Rose on February 20, 1984, 37 Crest was neither my dwelling house nor my usual place of abode. On February 20, 1984, I had permanently separated from Mrs. Rose and was living temporarily with Emma Faulk at the apartment of John Y. Brown, Sr. in Lexington, Kentucky; and (2) my permanent home and usual place of abode was with Emma Faulk at her home ("4100 Quinlin") located at 4100 Quinlin Drive, Palos Verdes Peninsula, California. Except for brief absences of less than a week each and the longer absence, when I was engaged in a trial in Kentucky as mentioned above, 4100 Quinlin has been my

home and my usual place of abode at all times since I separated from Mrs. Rose in November, 1983.

17. As of February 20, 1984, the date of alleged substitute service on my estranged wife, I had no intention of returning to live with Mrs. Rose or of returning to live at 37 Crest, and I have not done so at any time since; on April 17, 1985, I filed for a dissolution of my marriage to Mrs. Rose in the Los Angeles County Superior Court; a final judgment of dissolution was entered October 31, 1985.

18. As of February 20, 1984, I had every intention of continuing to live with Emma Faulk and of continuing to live at her home at 4100 Quinlin upon my return to California, and I have done so at all times since my return to California on March 14, 1984, except for brief absences from 4100 Quinlin of less than a week each.

19. At all times since our separation, Mrs. Rose has expressed a great deal of anger and hostility toward me and Emma Faulk, and there has been very little communication between us. Even if Mrs. Rose had received the papers that Plaintiff's process server claims to have served on her, it is very unlikely that she would have delivered them to me or told me about them.

C. Excerpts from Rose's 12/11/85 Brief.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

DEFENDANT ROSE'S BRIEF IN SUPPORT OF MOTION FOR RELIEF FROM DEFAULT JUDGMENT UNDER FRCP 60(b)(1), 60(b)(3) AND 60(a)
[Filed December 11, 1985]
[Caption Omitted]

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* * *

INTRODUCTION

The present motion seeks relief from this Court's default judgment entered December 11, 1984, by reason of mistake

[Rule 60(b)(1)], misrepresentation [Rule 60(b)(3)], and clerical mistake [Rule 60(a)]. This motion is supplementary to two other proceedings, one pending and one contemplated within a few days, in which Rose asserts that the default judgment is void. The pending proceeding is an appeal to the Ninth Circuit Court of Appeals, from a contempt order of the California District Court where the default judgment was registered. The contemplated proceeding is a motion to be made in this Court, under Rule 60(b)(4), to set aside the default judgment.

Our contention in those other proceedings is that the default judgment is patently void for lack of personal jurisdiction over Rose, because there was no valid service of process. Neither the federal rules nor the Colorado rules permit the service attempted here--mailed service and substituted service, both in California--

to be made outside the State of Colorado in which this Court sits. As to the federal rules, see FRCP 4(f); Davis v. Musler, 713 F.2d 907, 913 (2d Cir. 1983); Epstein v. Wilder, 596 F.Supp. 793, 796-97 (N.D. Ill. 1984). As to the Colorado rules, see CRCP 4(f)(1); Krendl, 1 Colorado Practice, Methods of Practice (3d ed. 1983) 401; Hardaway & Hyatt, 4 Colorado Practice, Civil Rules Annotated (2d ed. 1985) 20.

We recognize that logically the present motion should only be made after our voidness contentions are ruled on, and then only if we lose on voidness. If we win on voidness, the present motion is moot. Nevertheless, we make it now (1) because we are faced with a one-year time limitation for motions under Rules 60(b)(1) and 60(b)(3); (2) because there is no guarantee that we can get a correct ruling that the default judgment is void; and (3) even if we succeed in getting such a correct

ruling, it may be helpful to the Court and the parties if we raise punitive damage issues now, as they would be relevant to a later settlement or trial. As pointed out in the following Preliminary Statement, our objective in all of these proceedings is not to avoid--but rather to obtain--a merits determination or settlement of Rose's obligations to Fultz.

D. Excerpts from Rose's 3/31/86 Withdrawal of Offer.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

DEFENDANT ROSE'S WITHDRAWAL OF OFFER TO CONFESS JUDGMENT, AND REPORT ON STATUS OF OTHER PROCEEDINGS
[Filed March 31, 1986]
[Caption Omitted]

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B. Report on Status of Other Proceedings

1. Rose's appeal to the Ninth Circuit has now been fully briefed.

Both sides have now fully briefed Rose's appeal to the Ninth Circuit (No. 85-6202).

The principal issue there is Rose's contention that this Court's default judgment was void for lack of personal jurisdiction, based on failure to serve process. Rose's Appellant's Reply Brief was served March 21, 1986. For this Court's information, copies of the briefs of both sides will be lodged herewith. In addition to Rose's Appellant's Reply Brief, they include his Appellant's Opening Brief, and Fultz' Appellee's Answer Brief.

2. Our contemplated voidness motion in this Court has been deferred until after the ruling of the Ninth Circuit.

In our motion papers filed in this Court on December 11, 1985, we stated that we contemplated filing a second motion within a few days, asserting that the default judgment was void and asking this Court to set it aside. We did not file that motion as we then contemplated,

because further research convinced us that the only remedy to which we were entitled as of right was in pursuing the appeal that we had already filed in the Ninth Circuit. Accordingly, we will continue that pursuit in the Ninth Circuit, if (as we expect) Fultz' pending motion to dismiss or suspend our appeal is denied.